as Mr. Justice Murray-Aynsley as he then was in that case said:—

"Section 254(ii) provides such discharge shall not amount to an acquittal *unless the court so directs*, except in cases coming under section 171. Such discharge means, however, discharge under section 254. Therefore for a discharge to amount to an acquittal without a special order of the magistrate it must fall within the provisions of section 254 as well as of section 171."

Section 187(1) of the S.S. Code is identical with section 254(ii) and the application was made under that section so that it is clear that the learned magistrate had power to order an acquittal.

This power enabling the discharge of an accused person without acquitting him is a power which should be exercised sparingly and grudgingly and only where the court is satisfied for good cause shown that the public interest insistently demands that it be used. (*Seet Ah Ann* v. *Public Prosecutor* [2]). Our courts have consistently adopted the line that unless some very good ground is shown it would not be right to leave an individual for an indefinite period with a charge hanging over him. (*Goh Oon Keow* v. *R*;[3] *Tan Ah Chan* v. *R.*[4]). As Mr. Justice Spenser-Wilkinson said in *Public Prosecutor* v. *Suppiah Pather* reported in *Editorial Note* to *Ariffin bin Cassim Jayne* v. *Public Prosecutor* [5]:—

"If the prosecution are not ready to proceed with their case after reasonable adjournments have been granted, an accused person should not be allowed to suffer from the dilatoriness of the prosecution by being left with a charge hanging over his head indefinitely.

"Where the prosecution are unable to proceed for the time being owing to the difficulty of obtaining a witness or for some other cause and are unable to satisfy the court that they will proceed with the prosecution within a reasonable time, then there would be good grounds for a discharge not amounting to an acquittal. In this case, however, although counsel apparently only asked for a discharge not amounting to an acquittal I think the proper order would have been a discharge amounting to an acquittal."

Accordingly, as the learned magistrate had misdirected himself as to his power to make the order, I would for myself decide whether in all the circumstances of the case such order under section 187(1) should amount to an acquittal.

This case, as the petition shows, related to an offence alleged to have been committed on 28th July, 1966 and the summons was applied for almost 5 months later on the 22nd December, 1966. The case was finally called on the 13th June, 1967 when the order appealed from was made. It can thus be seen that there was ample time for consideration before action was initiated and it seemed a little hard on the appellant if he is not to be freed from the prospect of further prosecution because police would most probably take departmental action against him. The appellant must have been extremely worried over a period of nearly a year, as being a detective corporal he would have been aware that a complaint had been made against him. He had also, it appears from the file, incurred expenses in connection with the attendance of witnesses. I would, having regard to the foregoing, vary the order of the learned magistrate and direct that the discharge should amount to an acquittal.

Order of discharge amounting to acquittal substituted.

CHEE BAY HOON v. TAN CHONG & SONS MOTOR CO. LTD.

[A.C.J. (Pawan Ahmad J.) September 8, 1967]
[Malacca — Civil Appeal No. 2 of 1967]

Contract — Dealings between car dealers — Account stated — Document purported to be — Defendant's denial.

Practice and Procedure — Account stated — Ingredients of.

An account stated may take the form only of a mere acknowledgment of a debt; in that case though it amounts to a promise from which the existence of a debt may be inferred that inference may be rebutted; and then there is no consideration and no binding promise. But there is another form in which the account stated includes items on both sides, and the parties have agreed that there shall be a set-off and that only the balance shall be paid; in that case there is a promise for good consideration to pay the balance even though some of the debts were barred by limitation. *Siqueira* v. *Noronha*, [1934] A.C. 332.

The parties to this appeal were car dealers. The plaintiff had sued the defendants for $1,900 as the sum due from them out of a transaction entered into between the parties based on a document, P1, which was purported to be an account stated. The defendants denied the claim and counterclaimed for the sum of $955 on the ground of misrepresentation by the plaintiff to them.

Held: (1) the contents of P1 did not take the form of a mere acknowledgment of a debt amounting to a promise from which an inference of debt might be inferred and therefore it did not fall under the first form. Even if it did the defendants were still not barred from denying it;

(2) on a perusal of P1 it was clear that it also could not fall under the second form because there were no two proper columns showing the credit and debit columns and moreover the balance to be paid as shown at the bottom of P1 was the sum of $575 and not $1,900 as claimed by the plaintiff.

Cases referred to:—

(1) *Hong Teck Guan & Anor.* v. *Lam Soon Cannery Ltd.* [1959] M.L.J. 207 at p. 209.

(2) *Siqueira* v. *Noronha* [1934] A.C. 332.

(3) *Camillo Tank Steamship Co. Ltd.* v. *Alexandria Engineering Works* (1921), 38 T.L.R. 134, 145.

(4) *Laycock* v. *Pickles* (1863), 4 B. & S. 497.

(5) *Savoosah & Ors.* v. *Hajee Ismail* (1889), 4 Ky. 453, 458.

(6) *Subramaniam* v. *Retnam* [1966] 1 M.L.J. 172, 173.

MAGISTRATE'S CIVIL APPEAL.

D. A. Devadason for the appellant/plaintiff.

Eugene Lye for the respondents/defendants.

Cur. Adv. Vult.

Pawan Ahmad J.: This is an appeal against the decision of the President, Sessions Court, Malacca in Civil Action No. 30 of 1965.

The plaintiff was a car dealer trading under the style of Chee Motor Trading Company and the defendants were also car dealers and they were trading under the name of Tan Chong & Sons Motor Co. Ltd.

The plaintiff sued the defendants for the sum of $1,900 as the sum due from the defendants out of a transaction entered into between them based on a document (P1) which was purported to be an account stated. The defendants denied the claim and counter-claimed for the sum of $955 on the ground of misrepresentation by the plaintiff to the defendants.

The plaintiff's case was that on 3rd March 1965 he purchased from the defendants a new Datsun Blue Bird Special motor car No. MB 2134 for the sum of $6,495. In addition he had to pay to the defendants the sum of $355 towards road tax, registration, insurance, number plates and stamp fee for the said car. Therefore, he had to pay to the defendants in all the sum of $6,850. Towards the payment of this sum he had earlier on paid the defendants a deposit of $675 and on the date of the transaction, namely, on 3rd March 1965 he paid a further sum of $575. He also traded-in his second-hand 'Daf' saloon motor car No. MA 6681 for $3,500, thus leaving a balance of $2,100 to be paid by him to the defendants. The plaintiff added that he signed a transfer form and handed over possession of his second-hand Daf saloon motor car to the defendants in April 1964. The plaintiff admitted that he did not have enough money to pay the balance of the sum of $2,100 and so he took a loan of $4,000 from the defendants in their capacity as a finance company and after deducting the said sum of $2,100 the defendants owed him $1,900 but the defendants had failed to pay him this sum and he was claiming this sum from the defendants. In support of his case the plaintiff produced exhibits P1, P2, P3, P4 and claimed that P1 was an account stated and that the defendants were bound by the terms of P1.

The defendants through D.W.1, i.e. the manager of the defendants' company, on the other hand contended that P1 was not an account stated and it was not an invoice or an agreement but a mere rough statement made by an official of the defendants' company and it was never meant to be signed or handed over to a prospective customer. D.W.1 went on to say that regarding any trade-in his decision was final. It was also the contention of the defence that the plaintiff's second-hand car was only worth $955 but due to a misrepresentation by the plaintiff to the defendants, the defendants gave the plaintiff a credit of $1,900 for this car. Further, the defendants stated that the plaintiff did not at any time hand over the possession of the said second-hand car to the defendants. The defendants therefore denied the plaintiff's claim and counter-claimed for the sum of $955 for misrepresentation and failure on the plaintiff's part to hand over the said second-hand car to the defendants.

At the conclusion of the hearing the president dismissed the plaintiff's claim and entered judgment for the defendants on the counter-claim for the sum of $955 and costs.

The plaintiff now in his notice of appeal appeals against the whole decision of the president on several grounds but the sum total of his grounds of appeal is based on the proposition that P1 is an account stated and that the defendants are bound by P1. It is therefore only necessary for me to decide whether or not P1 is an account stated.

It is common ground that a transaction for the sale of the new Datsun Blue Bird Special motor car No. MB 2134 took place on 3rd March 1965 and that the plaintiff took a loan of $4,000 from the defendants in their capacity as a finance company towards the payment of the new car and in furtherance of this loan they executed a hire purchase agreement, namely exhibit D5, also on 3rd March 1965. It is also common ground that on that day the plaintiff had made two payments of $675 and $575 as evidenced by P3 and P4 towards the purchase of the said new car. The only contention between the two parties is that according to the plaintiff the agreement entered into between them in respect of the transaction was embodied in P1 and followed by a written agreement signed by him and Mr. Chew, an official of the defendants' company but he was not given a copy of the agreement. The plaintiff also contends that P1 is binding on the defendants and the defendants are precluded from disputing the contents of P1 because P1 is an account stated. The defendants on the other hand contend that P1 is a mere rough statement made by an official of the defendants' company and as such it was never meant to be binding on the defendants. The defence is that there was only a verbal agreement and the terms of the agreement between the parties were subsequently embodied in D5 and therefore D5 is the only agreement in writing between the parties and that they are bound by the terms of D5. In the case of *Hong Teck Guan & Anor.* v. *Lam Soon Cannery Ltd.*[1] the learned Tan Ah Tah J. (as he then was) has this to say about the definition of an account stated:—

"It is settled law that to constitute an account stated the following essential elements must be present,

first, there must be a definite amount due from one party to another, secondly, there must be an admission of a debt and thirdly, there must be a debt due from one party to another".

In dealing with this case, the president found as a fact from the evidence adduced at the trial that there was no admission of a debt by the defendants in P1 and therefore he said P1 did not amount to an account stated.

In order to appreciate the technical meaning of the words 'account stated', I would like to refer to the learned judgment of Lord Atkin in the case of *Siqueira* v. *Noronha* [2] :—

"Their Lordships think that what has been forgotten is that there are two forms of account stated. An account stated may only take the form of a mere acknowledgement of a debt, and in those circumstances, though it is quite true it amounts to a promise and the existence of a debt may be inferred, that can be rebutted, and it may very well turn out that there is no real debt at all, and in those circumstances there would be no consideration and no binding promise. But on the other hand, there is another form of account stated which is a very usual form as between merchants in business in which the account stated is an account which contains entries on both sides, and in which the parties who have stated the account between them have agreed that the items on one side should be set against the items upon the other side and the balance only should be paid; the items on the smaller side are set off and deemed to be paid by the items on the larger side, and there is a promise for good consideration to pay the balance arising from the fact that the items have been so set off and paid in the way described".

In the same judgment his Lordship also deals with the case of *Camillo Tank Steamship Co. Ltd.* v. *Alexandria Engineering Works* [3] and the case of *Laycock* v. *Pickles* [4] for the definition of account stated.

It seems to me therefore clear that before P1 can be termed as an account stated it must either fall under the first form or the second form described by Lord Atkin in the case of *Siqueira* v. *Noronha*. The first thing to consider is whether or not P1 can fall under the first form as described above by Lord Atkin. In my view the contents of P1 does not take the form of a mere acknowledgment of a debt amounting to a promise from which an inference of the debt may be inferred and therefore it does not fall under the first form. Even if it does the defendants are still not barred from denying it. Next, on a perusal of P1 it is crystal clear that it also cannot fall under the second form because there are no two proper columns showing the credit and debit columns and moreover the balance to be paid as shown at the bottom of P1 is the sum of $575 and not the sum of $1,900 as claimed by the plaintiff.

From the facts of the case the plaintiff admitted that he signed D5 but he denied that when he signed it the particulars in the blanks had been fillled in. He said he signed it in that blank form because he trusted Mr. Chew, an official of the defendants' company. He also admitted that when he signed D5 his signature was not witnessed by Mr. Chew but by Mr. Low (D.W.1). It is rather difficult to accept the plaintiff's story that when he signed D5 the particulars in it had not been filled in because he said that when he signed another agreement the particulars of P1 had been entered in it but he never received a copy of this agreement. The plaintiff himself is a dealer in motor cars and from the appeal record it is apparent that he is an English educated businessman who is well versed in motor car transactions and as such it is not possible to believe that he would have signed D5 witnessed by D.W.1 without first making sure that the particulars on the agreement had been entered in D5. Moreover, his story about transfer of the second-hand Daf saloon motor car to the defendants during the relevant period is not supported by D5 or by D7. In the case of *Savoosah & Ors.* v. *Hajee Ismail* [5] followed by Gill J. in *Subramaniam* v. *Retnam* [6] it is obvious that the plaintiff is estopped from denying the contents of D5 unless he can satisfactorily prove fraud, misrepresentation or the other exceptions stated therein. In fact during the relevant period the Daf saloon motor car was registered in the name of Lee Kim Sing and there was no registration of ownership claim by the plaintiff stamped on the registration card of the car. Moreover, on cross-examination P.W.1 admitted that he had not signed the transfer of the second-hand Daf saloon motor car to the defendants. Further, it is also inconceivable why the defendants acting as a finance company should give the plaintiff a loan of $4,000 if the plaintiff's story was correct that there was only a balance of $2,100 to be paid by the plaintiff to the defendants for the purchase of the said new Datsun motor car. I am therefore not surprised why the president dismissed the plaintiff's claim. It is obvious that the president disbelieved the story of the plaintiff in view of the overwhelming contradictions in the plaintiff's case.

Although the plaintiff stated in his notice of appeal that he appeals against the whole decision of the president but in his memorandum of appeal he has not raised any grounds of appeal on the counter-claim.

In the above circumstances I dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *D. A. Devadason; Eugene Lye & Co.*